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No. 07-690

IN THE

Supreme Court of the United States

DUCHESNE CITY, ET AL.,
Petitioners,

v.

SUMMUM, **a corporate sole and church,**
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The theory of Summum's litigation in the present case is indistinguishable from the theory of Summum's litigation in three other cases:[1] namely, a municipality displays on government grounds one or more monuments that private parties originally donated; such donated monuments supposedly qualify as **private** speech, despite government ownership and control of the displays; a First Amendment forum for private speech through permanent monuments therefore supposedly exists; and, Summum is thus supposedly constitutionally entitled, under forum analysis, to erect and display its own "Seven Aphorisms" monument on municipal property.

Summum has now prevailed on this faulty constitutional syllogism four times in the Tenth Circuit (the three cases cited *supra* note 1, plus the present matter). The Tenth Circuit, by an equally divided vote, failed to rectify en banc the error of these cases. Pet. App. 2h. The municipal defendants have therefore filed petitions for certiorari both in the *Pleasant Grove* case (No. 07-665) and in the present case.

Summum frankly embraces the Tenth Circuit's radical and aberrant jurisprudence. Equating

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[1] *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002); *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir.), *reh'g denied by an equally divided court*, 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-665 (U.S. Nov. 20, 2007).

"privately donated monuments" with "private speech," Opp. at 10, Summum recites that the court below "only" held that "once a government entity opens a traditional public forum to . . . the display of privately-donated monuments[,] it may not discriminate against other private speakers who wish to engage in the same form of speech, absent a compelling interest," *id.* That, of course, is exactly how the city (in this case), the Pleasant Grove petitioners, and the dissenters in the Tenth Circuit described the matter.

Summum holds out the prospect that the Tenth Circuit may not **always** ("necessarily") hold donated monuments to be private speech. Opp. at 10-11. This is highly dubious, considering that the analysis the Tenth Circuit employs on this issue seems to guarantee a finding of "private speech" whenever a private entity donates a finished product. *See Summum v. City of Ogden*, 297 F.3d 995, 1004-05 (10th Cir. 2002). Be that as it may, what is clear is that in four out of four of these cases, the Tenth Circuit has so held. The prospect of a future exception arising would appear rather faint at this point.

The circuit splits, the conflicts with this Court's cases, and the profound practical difficulties the Summum cases have generated are discussed at length in prior filings in *Pleasant Grove* and in the case at bar. *See also* Br. of Virginia et al. at 8 ("As a practical matter, a particular [form] of government speech -- accepting a donation of property and then using that property to convey the government's message -- has been abolished"); Br. of American Legion et al. at 4 ("The precedent established by the Tenth Circuit lays the foundation for the destruction of all donated veterans memorials nationwide and chills the erection

of any future memorials").

In this Reply, the city focuses on features and arguments pertaining directly to this case.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent Summum states that three Tenth Circuit judges dissented from the denial of en banc rehearing. Opp. at 9. In fact, **six** judges voted to rehear this case en banc. Pet. App. 2h. Three of these six went even further, either penning or joining written dissenting opinions. Pet. App. 3h, 10h.

Summum claims that petitioner Duchesne City "has never taken any steps to adopt the message on the Ten Commandments monument as its own." Opp. at 2. This is misleading. The pertinent question is **not** whether the city has affirmatively adopted the **inscription** on the monument. *See* Reply to Br. in Opp., *Pleasant Grove City v. Summum*, No. 07-665 (U.S. Mar. 7, 2008) § I. Rather, the question is whether the **display** of the monument is a **city display**; on that score, the city has taken all the steps it needs. The city demonstrated dominion over the monument by the very act of its attempted transfer of the monument and its underlying plot of land. Pet. at 5, 6. Moreover, the city expressly disavowed any intent to open the park as a forum for the display of **private** monuments. Pet. App. 1k.

ARGUMENT IN REPLY

Much of Summum's Brief in Opposition in this case rehashes or cross-references arguments Summum has

made in opposition to certiorari in *Pleasant Grove*. The petitions filed in this case and in *Pleasant Grove*, and the Reply to Brief in Opposition in *Pleasant Grove*, have already met those arguments and need not be repeated here.

Summum argues that the present case poses only the question whether "the City's attempted land transfer was invalid under state law," Opp. at i. This assertion is badly inaccurate. While the court below did address state law issues, the case revolved around Summum's federal claim of First Amendment "equal access for monuments," *see* Pet. App. 6a-13a, 17a-19a, 21a (First Amendment forum analysis). If this Court rejects (as it should) the underpinnings of Summum's federal Free Speech claim -- namely, the erroneous Summum line of cases -- then Summum's federal claim necessarily fails, and the state property issues Summum points to become moot. (At that point, the district court could simply decline to exercise supplemental jurisdiction over Summum's remaining state constitutional claims. *See* Pet. App. 23a (consigning question of supplemental jurisdiction to the district court on remand).)

Summum concedes that the city, in the court below, pressed a challenge to the notion that the city park at issue was a First Amendment "public forum" for private monuments. Opp. at 9. This is plainly a federal constitutional issue. This issue can be resolved either by overturning the Tenth Circuit's erroneous forum analysis, *see* Pet. at i (Question Two), 11-12 (citing square conflict with this Court's cases), 17 (reiterating conflicts on forum issue), or by overturning the Tenth Circuit on the antecedent question whether a government-owned, government-controlled

monument in a government park is even "private speech" in the first place, *see* Pet. at i (Question One), 12-15 (describing disagreement among Tenth Circuit judges on this issue), 17 (referencing conflicts on this issue).

Summum says this case is a "particularly poor vehicle for review," Opp. at 12. But the present case represents an especially glaring example of the relentless consequences of the false constitutional syllogism the Tenth Circuit has adopted. In this case there was only **one** donated monument in the city park, Pet. App. 2a, yet the Tenth Circuit held that there was a public forum for monuments, Pet. App. 7a-8a, 17a. *Cf. Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 47 (1983) (selective access does not create a public forum). When the district court confronted Summum about the radical implications of its theory, Summum freely admitted as much.

> THE COURT: Wouldn't that just set up a chain reaction? Wouldn't that theoretically, at least, if not in practice cause all of the other entities that are not being equally treated to demand the same? You might not have a city park big enough.
>
> MR. BARNARD [Summum's counsel]: * * * I think, yes, that is a possibility.
>
> * * * That city park may well end up * * * looking like a cemetery with many, many monuments.

Tr. of Mot. Hearing, *Summum v. Duchesne City*, No. 2:03-CV-1049DB (D. Utah Jan. 7, 2004), at 8-9.

Summum contends that if this Court grants

review in *Pleasant Grove*, the Court should not even hold the present case pending disposition of *Pleasant Grove*. Opp. at 13. This makes little sense.

The *Pleasant Grove* and *Duchesne* cases were orally argued before the same Tenth Circuit panel on the same day, were decided on the same day, and were consolidated for consideration and decision of the petitions for rehearing en banc. The separate opinions released in connection with the consolidated denial of rehearing en banc addressed both cases, in plain recognition of the identical underlying legal rationale. The cities' petitions in this Court raise overlapping if not identical issues. In the Tenth Circuit, both cities challenged Summum's public-forum-for-private-monuments rationale.

This Court should decide the cases together, either by granting review in both, or by at least, if this Court first grants the petition in *Pleasant Grove*, holding the present petition pending disposition of that case.

CONCLUSION

This Court should either grant the petition outright, or, in the alternative -- should this Court first grant the petition in *Pleasant Grove City v. Summum*, No. 07-665 (U.S. petition for cert. filed Nov. 20, 2007) -- this Court should hold the present petition pending disposition of *Pleasant Grove* and then grant certiorari, vacate the decision below, and remand for further proceedings in light of *Pleasant Grove*.

Respectfully submitted,

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